IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1019

NORA SWAFFORD,

Petitioner,

versus

DICK AVAKIAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PETITIONER HAS STATED NO REASON FOR GRANTING WRIT OF CERTIORARI.

Petitioner's alleged reason for granting the writ of certiorari is that the Fifth Circuit Court of Appeals rendered a decision in conflict with previous decisions of that Court and of this Court and in so doing, decided an important state question in a way that conflicted with applicable state law.

This case involves the application of the Georgia Long Arm Statute in a suit by plaintiff, allegedly a Georgia citizen, against a resident of California for breach of a contract of marriage.

This case does not fall within the provisions of this Courts Rule 19(b). The decision of the Fifth Circuit does not modify, or restrict use of, or application of the Georgia Long Arm Statute. It only concerns application of the particular facts in this case. It does not decide an important state or territorial question in a way in conflict with applicable state or territorial law. The decision below is not in conflict with any decisions of this Court.

The petition for certiorari rather than setting out reasons for granting the petition merely reargues the merits of the case which was decided below.

ARGUMENT AND CITATION OF AUTHORITIES

Petitioner states "on November 9, 1977, Mrs. Swafford filed a two count complaint for damages against Avakian in the United States District Court for the Northern District of Georgia, Rome Division. Count One sounded in contract for a breach of a marriage promise under Georgia law; Count Two sounded in tort for fraudulent misrepresentation."

Mrs. Swafford, cites *Shellenburger v. Tanner* (1976), 138 Ga. App. 399, (227 SE2d 266). This opinion confines its

discussion to Ga. Code Ann. §24-113.1(b) and its application. The three-prong test referred to in her petition concerns application of subsection (b) to a person who "commits a tortious act or omission within this State". This section has no application to a suit for breach of a contract. The Court of Appeals of Georgia made clear at page 411 that the provisions of section (b) were not as extensive as were the requirements of subsection (a) applicable to a contract action.

The test in *Shellenburger* requires that there be a legal cause of action against the defendant in addition to a finding of an injury in Georgia resulting from a tortious act in Georgia. The Court of Appeals of Georgia in that case held there was not sufficient contact with the State by the individual defendants to satisfy even the lesser requirements of subsection (b). Regarding the corporate defendant, the Court held the allegations of the complaint were not sufficient to support allegations of negligence in failing to transfer records and/or fraudulent deceit in concealing a material fact.

Count Two of the complaint is also based upon Avakian's proposal of marriage alleging he had no intention to comply with such promise. Mrs. Swafford cannot convert a breach of contract into a tort merely by alleging the defendant did not intend to comply with the contract.

The Courts of Georgia have consistently held that fraud cannot be predicated upon statements which are

promissory in their nature as to future acts. False representations which authorize an action for fraud and deceit must be made with reference to existing or past facts and not to future acts. See *S & S Builders, Inc. v. Equitable Investment Corporation* (1964), 219 Ga. 557, (134 SE2d 777), where the Court held at page 564:

> "4. The petition attempts to allege that defendant fraudulently induced plaintiff to sign the written instruments by promising plaintiff that defendant in the future would reduce the oral construction loan agreement to writing and recognize its existence and validity. 'Fraud can not be predicated upon statements which are promissory in their nature as to future acts.' *Jackson v. Brown,* 209 Ga. 78 (70 SE2d 756). 'Representations which authorize an action for fraud and deceit must be made with reference to existing or past facts and not to future acts.' *Monroe v. Goldbert,* 80 Ga. App. 770, 775 (57 SE2d 448), 'Ordinarily, promises to perform some act in the future will not amount to fraud in legal acceptation, although subsequently broken without excuse.' *Rogers v. Sinclair Refining Co.,* 49 Ga. App. 72, 74 (174 SE 207). It follows the allegations in the petition are not such as to authorize an action for fraud to be based upon them . . . *Beach v. Fleming,* 214 Ga. 303, 306 (104 SE2d 427)."

The complaint and the affidavit of Mrs. Swafford establish that any contract to marry entered into by the parties was one to be performed in California at some indefinite time in the future. Plaintiff alleges she left Georgia and traveled to California, arriving June 8, 1977, that on June 19, 1977, defendant gave a dinner party announcing his "approaching marriage to plaintiff". About two weeks passed and plaintiff was uneasy because "no wedding date had been set". She finally alleges that on June 30, 1977, the defendant told her the "engagement was off" and that she immediately left California for Georgia.

There is no cause of action in California for fraudulent promises to marry or for breach of contract to marry. California Civil Code §43.4 provides: "A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages." California Civil Code §43.5 provides: "No cause of action arises for: (a) alienation of affection; (b) criminal conversation; (c) seduction of a person over the age of legal consent; (d) breach of promise of marriage." In this regard, see also Witken, *Summary of California Law,* 8th Edition, pages 2722-2724, discussing representations involving promise of marriage.

Mrs. Swafford, is strenuously trying to avoid California law by bringing this action in Georgia. She contends in the complaint that a contract of marriage occurred May 9, 1977, when the defendant in California telephoned her at her home in Catoosa County,

Georgia. Her affidavit reveals she lived in California from August 16, 1962, until the early part of April 1977.

The complaint in paragraph 4 alleges "Their friendship blossomed into a romance and defendant proposed marriage, plaintiff agreed, but defendant delayed for reasons asserted by him. In early April of 1977 plaintiff, disillusioned by defendant's attitude, returned to her native state of Georgia, arriving there on April 9, 1977." It appears there was a contract to marry entered into in California. She does not allege when this agreement was made but was obviously after January, 1976, when she says he first called her. She does state that she was the one who became disillusioned and left the defendant in California.

Even after reaffirmation of the contract alleged to have been made May 9, 1977, there was never a marriage date agreed to by the parties. If there was any breach of the marriage contract, it occurred in California after her arrival on June 8, 1977. Paragraph II alleges "Plaintiff was uneasy because no wedding date had been set." She says in paragraph 12 of the complaint the defendant on June 30, 1977, told her the "engagement was off". Paragraph 13 alleges she then left California for Georgia.

The Court was correct in dismissing the complaint as to Count One upon two grounds: (a) Plaintiff does not have any cause of action against the defendant for

The only basis for applying the Georgia Long Arm Statute to the defendant in a suit for breach of contract would be subsection (a) of the statute. Subsection (a) requires the finding of an activity amounting to a "transaction of business" within the State of Georgia. As pointed out by the Court of Appeals in *Shellenburger v. Tanner* (1976), 138 Ga. App. 399, (277 SE2d 266) at 411, this activity must be more extensive than an activity which will support a finding of a "contact" with breach of promise to marry; (b) The defendant did not transact any business in Georgia.

The Georgia Courts have long held that a contract made in one state to be performed in another state will be governed by the laws of the state of performance. Supreme Court of Georgia in *Vanzant, Jones & Company v. Arnold, Hamilton & Johnson* (1860), 31 Ga. 210, at page 213, ruled: "In such cases, that is, when the contract is made in one place, and to be performed in another, it is a well settled rule, that the contract, in conformity to the presumed intention of the parties, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." More recently, that Court in *Pacolet Manufacturing Company v. Crescent Textiles, Inc.* (1963), 219 Ga. 268 (133 SE2d 96), held: "It is likewise the settled rule in this state that when a contract is made in one place to be performed in another, the contract, in conformity with the presumed intention of the parties, is to be governed by the law of the place of performance."

Georgia for the purpose of exercising jurisdiction in a tort action under subsection (b).

It is apparent subsection (a) uses the term "business" in the commercial and mercantile sense and is not intended to include a purely personal transaction. In a decision some four years after adoption of a Georgia Long Arm Statute containing language in subsection (a) identical to the language in the statute today, the Court of Appeals of Georgia in *Carey v. Linares* (1970), 121 Ga. App. 150 (173 SE2d 101), held a judgment obtained in Missouri against a Georgia resident was void because of lack of jurisdiction. In that case, a Georgia resident wrote to a Missouri resident asking for the loan of $1,500.00. The plaintiff sent the money to the Georgia resident. When it was not repaid, plaintiff filed suit in the local magistrate's court in Missouri and obtained service under the Missouri long arm statute. The Court of Appeals held:

> "We believe the Missouri court would hold that their statute was not intended to apply to a purely private, relatively modest transaction between individuals where the defendant was never physically present within the state and where the only 'contact' was established by an artificial, 'place of contract' rule designed for conflict of law purposes. See *O'Neal Steel, Inc. v. Smith*, 120 Ga. App. 106 (169 SE2d 827).
>
> "To hold otherwise would be to deny such defendants, for all practical purposes, the opportunity to be heard. With no insurance company or corporation to bear the costs of out-of-state litigation as a routine business expense, default judgments would be the rule. We believe that in its application to this type of situation, the statute would offend traditional notions of fair play and substantial justice."

"Business" has consistently been defined by the courts in terms of its ordinary sense as being related to matters concerned with earning a living. *Snow v. Johnston* (1943), 197 Ga. 146 (28 SE2d 270); *Flynt v. Stone Tracy Company* (1910), 220 U.S. 107.

Kulko v. Superior Court of California In and For the City and County of San Francisco, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) cited by the Fifth Circuit supports this distinction between commercial and non-commercial activities.

Petitioner relies upon *Thorington v. Cash* (5th Cir. 1974), 494 F2d 582. That decision concerned application of subsection (b) to a nonresident who allegedly sent by mail, or telephone, or both, fraudulent misrepresentations upon which he intended that plaintiffs rely in entering into a limited partnership; and, who allegedly obtained such reliance thus committing a "tortious act" in Georgia, subjecting him to jurisdiction under the Georgia long arm statute, Code 24-113.1(b). There were allegations of misrepresentation of existing facts unlike the instant case.

An action for breach of promise is an action on breach of contract. *Harris v. Tisom* (1879), 63 Ga. 629. This case is thus controlled by the decisions in *Fulghum Industries, Inc. v. Walterboro Forest Products, Inc.* (5th Cir. 1973), 477 F2d 910, and *Pennington v. Toyomenka, Inc.* (5th Cir. 1975), 512 F2d 1291. *Fulghum Industries, Inc.*, held that the Georgia long arm statute was not applicable in that action for breach of contract. This was ruled even though as part of the negotiations for the contract executed by parties in their respective states, officers of defendant corporation had visited the Georgia plant of plaintiff and other sawmills erected by plaintiff in Georgia and there had been numerous telephone calls and mail communications related to the contract between the Georgia plaintiff and the South Carolina defendants.

In the *Pennington* case the Court held that a business corporation which transmitted communications from New York to Georgia by means of telephone and mail, which sent goods into Georgia and was paid by checks drawn on a Georgia bank had not "transacted business" within Georgia long arm statute where it had never had an agent or employee located in Georgia, had never manufactured any product in Georgia, and had never been domesticated or authorized to conduct business in Georgia. The company was not subject to in personam jurisdiction in Georgia even though the corporation had sent agents into Georgia to meet with the Georgia Company concerning the accounts in issue after consummation of the business and prior to filing the complaint.

See also the decision of Chief Judge Lawrence in *Interstate Paper Corporation v. Air-O-Flex Equipment Company* (S.D. Ga. 1977), 426 F.Supp. 1323. Judge Lawrence stated that in Georgia, to maintain a suit in tort arising out of a contract the breach of duty must be one imposed by law and not merely by the contract itself. He went on to rule that a foreign corporation which fabricated and shipped materials and components for a wood chip dumper to Georgia F.O.B. Minneapolis could not be served under Ga. Code Ann. § 24-113.1(a). He held said subsection was applicable to actions on contract and the defendant corporation did not transact business in Georgia although there had been negotiations between plaintiff and defendant by mail.

Any question about the correctness of the rulings of the District Court and the Fifth Circuit in this case should have been laid to rest by the Court of Appeals of Georgia in *Berry v. Jeff Hunt Machinery Company*, 148 Ga. App. 35, ___SE2d___ (1978). The Court held a South Carolina judgment against Berry, a Georgia resident was void for lack of jurisdiction. The decision was based upon Georgia law. The Court ruled:

> "3. On motion for summary judgment, the uncontroverted facts show that Berry traveled to South Carolina to discuss with Hunt the lease of heavy equipment, and thereafter other negotiations apparently transpired over the telephone and via the mails. Two pieces of equipment were shipped

to Georgia and a third piece of equipment was picked up by Berry in South Carolina. All lease payments were sent to Hunt's office in South Carolina. The facts are in conflict as to whether the subject matter of this case (the actual pieces of machinery ultimately leased by the appellant) were discussed in South Carolina; however, the leases themselves were sent to and signed by the appellant in Georgia. Finally, the appellant returned for repairs one of the leased pieces of equipment to the appellee in South Carolina.

"For purposes of 'long-arm' jurisdiction, '[m]ailing or telephoning orders to another state does not of itself constitute the transaction of any business . . .' *Process Systems v. Dixie Pkg. Co.*, supra, p. 456. Similarly, where there are no negotiations or contracts entered into in the forum state, with respect to the goods that are the subject matter of the litigation, there have not been sufficient 'contacts' with the forum state to comply with the 'transacting business' requirement of Georgia Long Arm Statute. *O.N. Jonas Co. v. B & P Sales Corp.*, 232 Ga. 256 (206 SE2d 437). On the facts presented on motion for summary judgment, the activities of the appellant in the forum state did not satisfy the 'minimum contacts' requirement of the Georgia Long Arm Statute, a prerequisite to the establishment of extraterritorial jurisdiction, and a foreign

judgment shall not be recognized by the courts of this state if the foreign court did not have personal jurisdiction over the defendant. Code Ann. §110-1304(b); *Boggus v. Boggus*, supra. Accordingly the trial court erred in entering summary judgment in favor of the appellee."

CONCLUSION

It is respectfully submitted the District Court was correct in dismissing the action for lack of personal jurisdiction over the defendant. Petitioner has shown no reason why the petition for writ of certiorari should be granted and the petition should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for DICK AVAKIAN in the above-stated case and that I have served the above and foregoing Respondent's Brief in Opposition To Petition For Certiorari, upon Petitioner, Nora Swafford, by mailing three copies thereof to Mr. Frank M. Gleason, Attorney at Law, 102 Howard Street, Rossville, Georgia 30741, attorney for petitioner, in a properly addressed envelope with sufficient postage affixed thereon.

This 26 day of February, 1979.

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